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No. 212

**In the Supreme Court of the
United States**

OCTOBER TERM 1960

**MOSES LAKE HOMES, INC., LARSONAIRE HOMES, INC.
and LARSON HEIGHTS, INC.,**

Petitioners,

vs.

GRANT COUNTY,

Respondent.

**On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit**

BRIEF FOR PETITIONERS

**LYCETTE, DIAMOND & SYLVESTER
AND LYLE L. IVERSEN**

Attorneys for Petitioners

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OPINIONS BELOW

The memorandum opinion of the trial court (Tr. 266 is not contained in official reports. The opinion of the Court of Appeals (R. ~~343-369~~) is reported at 264 F. (2d) 502. 341. 369.

JURISDICTION

The judgment of the Court of Appeals was entered on January 26, 1960 (R. 370) and thereafter 344.

a petition for rehearing was filed February 24, 1960 (R. 370) and an order denying petition for rehearing was entered May 17, 1960 (R. 371). Petition for Writ of Certiorari was docketed by this court on July 5, 1960. The writ was granted on October 9, 1960. The jurisdiction of this court is invoked under Title 28, United States Code, section 1254 (1).

STATUTES INVOLVED

Statutes pertinent to the consideration of this case are section 511 of the Housing Act of 1956, 69 Stat. 653, Title 42, United States Code; Annotated section 1594, Note, which is set out in Appendix A hereto; section 84.40.030 of the Revised Code of Washington, particularly the last paragraph thereof, which statute is set out in Appendix B hereto; section 84.40.080 of the Revised Code of Washington which is set out in Appendix C hereto.

QUESTION PRESENTED

Where petitioners held leaseholds from the federal government on housing projects on a military reservation which were taxed by a county of the State of Washington upon the full value of the physical improvements on the property leased pursuant to a decision of the highest court of the state as to the state tax laws with respect to such leases from the federal government; whereas, under the established law of the state all other leaseholds including those held from the state were taxed much lower, based upon the fair market value of the leasehold, considered in the light of its burdens and benefits; will a federal court enforce such a discriminatory tax against a deposit of estimated compensation in a condemnation of such leasehold?

STATEMENT OF THE CASE

Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc., respectively, were sponsors of Wherry Act housing projects on Larson Air Force Base in the State of Washington, pursuant to leases made to them by the Secretary of the Air Force under the Wherry Act, Title VIII of the National Housing Act, Title 5 USC 625 S-3 and Title 12 USC 1748 to 1748(h) (R. 99, 103, 140). The United States commenced condemnation proceedings to acquire the leasehold interests of the three corporations (R. 3) and a declaration of taking was entered on March 1, 1958 (R. 18).

At that time the United States paid into the Registry of the Court estimated compensation to the three corporations in the aggregate amount of \$253,000.00 (R. 26). Grant County, Washington, filed with the court an Assessment Lien and Statement (R. 72) and subsequently filed with the court a petition for order directing payment of money to it (R. 83), wherein it claimed to have certain lien rights for personal property taxes against the property for the years 1955 through 1959 and petitioned the court to have the estimated compensation on deposit paid to it on the basis of its claimed lien (R. 83). The three corporations also petitioned for payment of the estimated compensation to them. (R. 181).

The court tried the issue so made up, following which it entered its Findings of Fact and Conclusions of Law (R. 151) and a Judgment (R. 150), whereby claims of Grant County against the estimated compensation were denied except as to its claim against Moses Lake Homes, Inc., which was allowed for 1955 taxes and for 1956 taxes.

Appeal and cross-appeal were taken pursuant to Rule 54b of the Rules of Civil Procedure to the Ninth Circuit Court of Appeals by the respective parties, which reversed in part and affirmed in part the judgment of the lower court and remanded the cause to the District Court for further proceedings (R. 340). It is that judgment which we seek to have reviewed.

The three corporations held leases from the Government under which they were to erect, maintain and operate on a military reservation a housing project for a period of seventy-five years, unless sooner terminated by the Government (R. 103). The project was to be financed by an FHA insured loan (R. 106) and the housing units were to be leased to military and civilian personnel assigned by the military commander (R. 107). The lease, in paragraph 11 (R. 103), provided that buildings as soon as erected were to become the property of the Federal Government (R. 113).

The Assessor of Grant County in June, 1954 listed the physical improvements placed upon the military reservation by one of the corporations, Moses Lake Homes, Inc., upon his "Detail and Assessment List" for 1955 taxes (R. 152). Thereafter, in July of 1954 Grant County was restrained by the Superior Court of the State of Washington from levying or attempting to levy taxes against the property of Moses Lake Homes, Inc., and the restraining order remained in effect until December, 1957 when the Supreme Court of the State of Washington, in *Moses Lake Homes, Inc. v. Grant County*, 51 Wn. (2d) 285, 317 P. (2d) 1069, set the injunction aside and held that plaintiff Moses Lake

Homes, Inc.'s leasehold was taxable at the valuation of the physical improvements (R. 154).

During the time that the injunction was outstanding the officials of Grant County took no action to list or assess the property of Larsonaire Homes, Inc. or Larson Heights, Inc., although they were not restrained from doing so. Also, no further assessment of the property of Moses Lake Homes, Inc. was attempted during that period, but after the Moses Lake Homes, Inc. injunction was lifted in 1957 the County taxing officials for the first time listed on the tax rolls the property of Larsonaire Homes, Inc. and Larson Heights, Inc. for any years, and listed for the first time the property of Moses Lake Homes, Inc. for years subsequent to 1955. This listing was accomplished pursuant to the Washington omitted property statute, section 84.40.080, Revised Code of Washington, (Appendix C hereto) which provides in its essential parts:

"The Assessor . . . shall enter in the detail and assessment list of the current year any property shown to have been omitted from the assessment list of any preceding year at the valuation of that year, or if not then valued, at such valuation as the assessor shall determine from the preceding year . . .

. . . When such an omitted assessment is made, the taxes levied thereon may be paid within one year of the due date of the taxes for the year in which the assessment is made without penalty or interest."

Prior to 1957 no actual levy whereby the amount of the taxes was ascertained had been made (R. 153). All of the taxes thus became payable for the first time in 1957.

Congress, by section 511 of the Housing Act of 1956 (Appendix B infra) prescribed that taxes

might be levied against the interests of Wherry Act leaseholders,

" * * * Provided, That no such taxes or assessments (not paid or encumbering such property or interest prior to June 15, 1956) on the interest of such lessee shall exceed the amount of taxes or assessments on other similar property of similar value, less such amount as the Secretary of Defense or his designee determines to be equal to * * * "

certain payments made by the federal government or the lessee.

Both the trial court and the circuit court of appeals herein have found that these Wherry Act lessees were taxed upon their leaseholds upon a *different and higher basis* than taxes are assessed against other similar property of similar value. (R. 155, R. 355).

By a Washington statute, section 84.40.030 of the Revised Code of Washington (Appendix C *infra*) it is provided:

"Taxable leasehold estates shall be valued at such price as they would bring at a fair, voluntary sale for cash."

The Washington Supreme Court has applied this statute to all non-Wherry Act leaseholds and has held with respect to leaseholds held from the State of Washington, and with respect to all leaseholds other than federal Wherry Act housing project leaseholds, that in valuing the leaseholds for taxation purposes they must be measured by their *market value* considered in the light of their burdens and benefits. *Metropolitan Building Co. v. King County*, 72 Wash. 47, 129 Pac. 883; *Metropolitan Building Co. v. King County*, 62 Wash. 409, 113 Pac. 1114; *Metropolitan Bldg. Co. v. King County*, 64 Wash. 615, 117 Pac. 495; *In re Metropolitan Build-*

ing Co., 144 Wash. 469, 258 Pac. 473 (R. 155).

The State of Washington has followed a different method of evaluating Wherry Act housing projects for taxation purposes by the decision of its Supreme Court in the case of *Moses Lake Homes, Inc. v. Grant County*, 51 Wn. (2d) 285, 317 P. (2d) 1069, whereby the Supreme Court of Washington held that with respect to Wherry housing project leases, the value of the leasehold interest is the full value of the buildings and the improvements (R. 155). The Circuit Court of Appeals (R. 355) held the finding of the trial court (R. 155) to be correct where the trial court stated:

"By the laws of the State of Washington, as declared by its Supreme Court, taxes and assessments on Wherry housing projects are thus levied upon a basis different and higher than the amount of taxes and assessments on other similar property of similar value."

The Circuit Court said (R. 355):

"The trial court's further finding that a different method was used in valuing the Wherry Act project leaseholds here in question is also correct. Likewise to be sustained is the court's finding that the method used in assessing the Moses Lake leaseholds resulted in a higher tax than would have been true in the case of a non-Wherry Act leasehold."

The Circuit Court, however, proceeded to hold that the failure to tax upon the same basis as other similar property is taxed did not invalidate the tax, but only required that the amount deductible be reduced to what it would have been had the tax been levied upon a non-Wherry Act leasehold basis (R. 355). The court there said:

"Under Section 511, however, the fact that the taxes are higher does not invalidate the entire tax. It only requires that the amount

collectible be reduced to what it would have been had the tax been levied on a non-Wherry Act leasehold basis."

The court held that those taxes on Moses Lake Homes, Inc. which, except for the injunction, would have been assessed and levied prior to June 15, 1956 (the date mentioned in Section 511 of the Housing Act of 1956 [Appendix A infra]) were collectible in full (R. 353, 354).

The Secretary of the Air Force through his authorized representative, under date of 4 September, 1957, made a determination of the credits to be allowed against the taxes, pursuant to Section 511 of the Housing Act of 1956 (Appendix A infra) which determination appears in Record 125.

Grant County in attempting the taxation did not take into account that determination (See Request for Admission 12, R. 102, and answer thereto, R. 141). The Assessor of Grant County, in fixing the assessed values of the properties, based his valuation upon the market value of the physical improvements on the respective property held by respective plaintiffs, without reference to the market value of the leaseholds of the respective plaintiffs and without reference to mortgages and encumbrances against leaseholds (R. 102, 141). The leaseholds were heavily encumbered by mortgages (R. 355, footnote).

The statutes of Washington make no provision for allowing any credits against taxes as contemplated by section 511 of the Housing Act of 1956.

The Circuit Court has ordered the cause remanded to the District Court to enter judgment against Moses Lake Homes, Inc. for 1955, 1956 and 1957 taxes and for further proceedings to determine the amount of other taxes to become due, based

upon assessments on the same basis as other similar property is assessed, and after allowing proper credits for the amounts to be redetermined by the Secretary of the Air Force, pursuant to section 511 of the Housing Act of 1956 (R. 368).

SUMMARY OF ARGUMENT

The taxes which Grant County seeks to have the federal court enforce are inherently illegal under federal law because they discriminate against leases from the federal government by imposing taxation at a different and higher rate from that which is imposed upon similar leases from the state or from private individuals. The law of the State of Washington as construed by its highest court is repugnant to basic principles of our federal system and are so contrary to federal law that the assistance of federal courts in their enforcement should be denied.

ARGUMENT

A. The Taxes Discriminated Against Federal Leases.

Both the trial court and the Circuit Court of Appeals have found in this case that the tax which Grant County seeks to enforce in this action is discriminatory against these federal leases. The trial court in paragraph IV, (R. 155) of the findings of fact dealt specifically with the matter of discrimination and found as follows:

"The State of Washington by statute, section 84.40.030 of the Revised Code of Washington provides that taxable leasehold estates shall be valued at such price as they would bring at a fair, voluntary sale for cash. The Supreme Court of the State of Washington has held that with respect to leaseholds other than Wherry

Housing project leaseholds that in valuing the leasehold for taxation purposes it must be measured by its market value, considered in the light of its burdens and benefits. *Metropolitan Building Co. v. King County*, 72 Wash. 47, 192 Pac. 883; *Metropolitan Building Co. v. King County*, 62 Wash. 409, 113 Pac. 1114; *In re Metropolitan Building Co.*, 144 Wash. 469, 258 Pac. 473. The State of Washington has followed a different method of evaluating Wherry Housing projects for taxation purposes by decision of its Supreme Court. In the case of *Moses Lake Homes v. Grant County*, 151 Wash. Dec. 254 (51 Wn (2d) 285, 317 P. (2d) 1069) whereby the Supreme Court held that with respect to Wherry Housing project leases, the value of the leasehold interest is the full value of the buildings and improvements. By the laws of the State of Washington as declared by its Supreme Court, taxes and assessments on Wherry Housing projects are thus levied upon a basis different and higher than the amount of taxes and assessments on other similar property of similar value."

The Circuit Court of Appeals said (R. 355):

"The trial court's further finding that a different method was used to evaluate the Wherry Act project leaseholds here in question is also correct. Likewise to be sustained is the court's finding that the method used in assessing the Moses Lake leaseholds resulted in a higher tax than would have been true in the case of a non-Wherry Act leasehold."

The law of the State of Washington is well-settled in a long series of cases involving leases from the State of Washington to the effect that such leaseholds from the state must be measured by the market value of the leasehold considered in the light of its burdens and benefits. Thus, in *Metropolitan Building Co. v. King County*, 72 Wash.

47, 129 Pac. 883, which involved a fifty-year lease from the State of Washington on property on which the lessee erected buildings which became the property of the lessor, much as in the present case, the Washington Supreme Court stated the principle as follows:

"As we have stated, the state owns both the fee and the improvements subject only to the right of user in the respondent. The leasehold is burdened by a debt exceeding the value placed upon the lease by most of the witnesses. A purchaser of the lease would necessarily stand in the shoes of the respondent. He would take what it has with all its burdens, no more and no less. We had supposed that the former appeals fixed the standard of estimating the value. In the first appeal, we said that the value of the leasehold interest is its actual value in money on the date of the assessment, and

"The value of the term is fixed with reference to present as well as prospective conditions; not speculative, but actual; or, to state the proposition more aptly, its value in money to one who desires to sell but who is under no necessity of selling, and to one who is desirous of buying but is under no compulsion to do so."

" * * * We say here, as we have said before, that the value of the leasehold interest is to be measured both by its burdens and its benefits. It cannot be otherwise. A purchaser would necessarily take it *cum onere*."

In this case the state, instead of following the method used in taxing similar leaseholds from the state disregarded the burdens against the property in the form of mortgages and took no cognizance of the salability of the leasehold estate but simply levied the tax upon the full value of the physical property itself.

The impact upon the facts of this case was well stated by the Circuit Court of Appeals in footnote No. 18, (R. 355) where the court said:

"The Moses Lake leasehold was heavily encumbered by a mortgage. The amortization of this indebtedness was not taken into account in assessing the leasehold as only the value of the physical improvements was considered. But had the valuation of the leasehold been measured by its market value considered in the light of its burdens and benefits, the necessity of amortizing the mortgage would have been taken into account. See *In re Assessment of Metropolitan Building Co.*, 144 Wash. 469, 258 Pac. 473, 476. Had it been taken into account, the assessed value for 1958 and therefore the levied tax would have been substantially lower, though we do not know how much lower."

It is apparent that the taxes sought to be enforced against the estimated compensation in this condemnation proceeding were thus discriminatory as compared to the taxes that would have been levied against any other comparable type of property.

B. State Taxes Which Discriminate Against Federal Contractors Violate the Federal Law.

This court has recently had occasion to recognize and apply the principle that state taxes may not discriminate against the government nor those with whom it deals. In *Phillips Chemical Co. v. Dumas Independent School District*, 361 U. S. 376, 4 Law Ed. (2d) 384, this court directly held that a state tax is invalid where it undertakes to levy a tax against the lessee from the federal government on a basis which discriminates against the lessee in a manner that it would not do if the lease were held from the state. This court there said:

"As we had occasion to state quite recently, it still remains true as it has from the time of *McCulloch v. Maryland*, 4 Wheat. 316, that a state tax may not discriminate against the Government or those with whom it deals. See *U. S. v. City of Detroit*, *supra*, 473. Therefore, this tax may not be exacted."

This court early adopted the principle that a state may not constitutionally levy taxes on those dealing with the federal government except on a non-discriminatory basis. In *McCulloch v. Maryland*, 4 Wheat. 316, 4 Law Ed. 579, this court said:

"The opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank in common with the other real property within the state, nor to a tax imposed on the interests which the citizens of Maryland may hold in this institution in common with other property of the same description throughout the state."

Throughout the years this court has reiterated the proposition that taxation by states of those who deal with the federal government must be non-discriminatory. For example, see *Miller vs. Milwaukee*, 272 U. S. 713, 47 Sup. Ct. 280, 71 Law Ed. 487; *Graves v. New York ex rel O'Keefe*, 306 U. S. 466, 59 Sup. Ct. 595, 83 Law Ed. 927; *Alabama v. King and Boozer*, 314 U. S. 1, 62 Sup. Ct. 43, 86 Law Ed. 3; *Smith v. Davis*, 323 U. S. 11, 65 Sup. Ct. 157, 89 Law Ed. 107; *James v. Dravo Contracting Company*, 302 U. S. 134, 58 Sup. Ct. 208, 82 Law Ed. 155; *Buckstaff Bathhouse Company v. McKinley*, 308 U. S. 358, 60 Sup. Ct. 279, 84 Law Ed. 322; *Oklahoma Tax Commission v. Texas Company*, 336 U. S. 342, 69 Sup. Ct. 561, 93 Law Ed. 721; *Helvering v. Gerhardt*, 304 U. S. 405, 58 Sup. Ct. 969, 82 Law Ed. 1427.

There is no dissent from the proposition that a state in taxing the property of an individual may not pick his property out for special adverse treatment because it is put to a federal use. That is exactly what the effect of the Washington law is where it taxes Wherry Act leaseholds alone, of all leaseholds in the state, on a different and higher basis.

C. Federal Courts Should Not Lend Their Power to Enforce State Taxation Discriminatory Against the Federal Government.

A cornerstone of our constitutional system is the right of the federal government and those with whom it deals to be free from coercion or discrimination by the states; indeed, such right is essential to the existence and functioning of the federal government as this court has recognized in the case of *Phillips Chemical Co. v. Dumas Independent School District*, 361, U.S. 376, 4 Law Ed. (2d) 384, and other cases above cited.

We are concerned here with an application by a political subdivision of the State of Washington to a federal court to enforce against funds deposited by the federal government in the federal court, in a condemnation proceeding, a plainly discriminatory tax. Courts do not lend their assistance to carry out that which offends against the law or the public policy of the sovereignty to which they owe their existence. This court in the case of *Bank of the U. S. v. Owens*, 2 Peters 527, 7 Law Ed. 508, said:

"Courts are instituted to carry into effect the laws of the country; how can they then become auxiliary to the consummation of violation of law?"

"There can be no civil right where there can be no legal remedy and there can be no legal remedy for that which is itself illegal."

The Circuit Court of Appeals while finding these taxes to be discriminatory, nevertheless undertook to enforce them for the years 1955, 1956 and 1957 (R. 368); which result was based largely upon the contention that the matter was concluded by the decision of the Supreme Court of Washington in the case of *Moses Lake Homes, Inc. v. Grant County*, 51 Wn. (2d) 285, 317 P. (2d) 1069 (R. 349). The court was wrong in so holding.

The first time that a federal court had been called upon to apply the discriminatory Washington law was in this case involving the condemnation of the leaseholds. The Washington Supreme Court case above referred to did not involve a judgment for any taxes in any actual amounts. Indeed none had been levied at the time of the decision (R. 345). The decision of the Washington Supreme Court in the case of *Moses Lake Homes, Inc. v. Grant County*, 51 Wn. (2d) 285, 317 P. (2d) 1069, is conclusive, only to the extent of what it held and that is that under the laws of the State of Washington the value of the leasehold interest of Moses Lake Homes, Inc. is the full value of the buildings and improvements. Insofar as this is a construction of the law of the State of Washington, that decision is controlling.

The decision did not undertake to deal with the question of whether it would result in treating these federal leases differently from other leaseholds. It did not discuss or consider whether the law as so construed would have the effect of taxing leases from the federal government at a higher rate than similar leases from the state. The Washington Supreme Court in arriving at its decision, rather

blindly followed what it conceived to be the result of a decision of this court, but in so doing made no comparison of the result with the method by which it had said all other leaseholds are to be taxed by the State of Washington.

While state courts have supreme power to interpret the written and unwritten laws of the state, *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673, 74 Law Ed. 1107, the federal courts are not bound by state court decisions concerning questions arising under the federal Constitution.

" * * * Even the decisions of the highest state courts are not binding upon the federal courts concerning questions arising out of the Constitution of the United States. The United States Courts are the peculiar guardians of the Constitution of the United States." *Howard v. Cordner*, 116 F. Supp. 783.

In this case the highest court of the State of Washington established conclusively the law of the State of Washington to be that the State of Washington would discriminate against sponsors of Wherry Act Housing projects. This is strictly a construction of state law. The Washington Court did not purport to construe any federal statute and did not discuss or purport to construe any federal constitutional principle that is here involved. As the court stated in its opinion, the matter before it was the determination of the nature of the interest of the taxpayer and the manner of evaluating the property. The decision of the State Supreme Court was the act of the State of Washington and established the law of the state. The federal courts were not bound by its legal implications insofar as they resulted in discriminatory treatment of federal leases.

This was not a matter which was *appealable* to the United States Supreme Court. Vol. 30A, American Jurisprudence, page 386, section 344, states:

"It has been held that a determination of a federal constitutional question by a state tribunal is not conclusive if there is no right of appeal on the federal question from the highest court of the state to the United States Supreme Court."

Citing *Garland Co. v. Filmer*, 1 F. Sup. 8.

The right of appeal from a state supreme court decision to this court is strictly statutory. The statute is Section 1257, of Title 28, U.S.C. That section reads:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

It will be noted that appeal can be had only where there is drawn into question the validity of a treaty

or statute of the United States and the decision is against its validity, or where there is drawn into question the validity of a state statute as being repugnant to the constitution, treaties or laws of the United States and the decision is in favor of its validity. In this case there was no decision against the validity of a federal statute nor was there any state *statute* discussed in the opinion. The validity of a state statute was not one of the issues mentioned by the court. This was strictly a matter of *judge-made law* where the court in the case of *Moses Lake Homes, Inc. v. Grant County*, 51 Wn. (2d) 285, 317 P. (2d) 1069, undertook to declare the method of taxing a sponsor of a Wherry Act housing project. No statutes or treaties of any kind whatsoever were discussed, sustained or invalidated by the opinion. The decision of the Washington State Supreme Court clearly did not come within the letter of the statute permitting *appeals* to this court. 36 C.J.S., sec. 238 points out:

"The statutory grant of appellate jurisdiction to the United States Supreme Court will be strictly construed."

It is quite clear that there was no appeal to this court as a matter of right from the decision of the Washington Supreme Court.

Subsection 3 of Section 1257, Title 28, U. S. C., provides that review may be had by Writ of Certiorari where any:

" * * * title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of or commission held or authority exercised under the United States."

This is not a review as a matter of right to a petitioner. That section is limited by the constructions

that have been placed upon it and again would not make access to this court available from the decision of the Washington Court above referred to. First of all, such a privilege is one that this court could grant or deny at its pleasure. More important, however, is the fact that under the rules which this court has announced for assuming to review a state court decision, this is not a matter which it would have entertained. One of the cardinal principles for reviewing a state court decision is that only federal questions *discussed in the state court decision* will be reviewed by this court. Thus, in *Northwestern Bell Telephone Co. v. Nebraska State Railway Commission*, 297 U. S. 471, 80 L. Ed. 810, the court refused to pass upon contentions made as to disregard by a state court of federal rights saying:

"Its opinion discusses only the first two contentions made here and we accordingly confine our review to them. See *Miedreich v. Allenstein*, 232 U. S. 236, 58 L. Ed. 584; *Cissna v. Tennessee*, 246 U. S. 289, 62 L. Ed. 720; *Saltonstal v. Saltonstal*, 276 U. S. 260, 72 L. Ed. 565."

To the same effect see *Cox vs. Texas*, 202 U. S. 446, 50 L. Ed. 1099. This court has consistently held that it will not review state court decisions as to questions not passed upon by the state court in its decision. *State Farm Mutual Insurance Co. v. Duell*, 324 U. S. 154, 89 L. Ed. 812. The federal question must not only have been raised in the state court but it must have been decided within the state court. *Matheson v. Branch Bank of Alabama*, 48 U. S. 260, 12 L. Ed. 692; *Wilson v. Cook*, 327 U. S. 474, 90 L. Ed. 793; *Mellon v. O'Neil*, 275 U. S. 212, 72 L. Ed. 245; *Seaboard Airline Railway v. Duvall*, 225 U. S. 477, 56 L. Ed. 1171; *Appleby v. Buffalo*,

221 U. S. 524, 55 L. Ed. 838; *Matthews v. Huwe*, 269 U. S. 262, 70 L. Ed. 266.

In the present case nothing appears in the decision of the state court to show that any federal question was ever considered or passed upon. Thus, under the precedents of this court, not even certiorari would have been available to review the question of the federal acceptability of the state law.

Prior to the present case there has never been an opportunity to present to a federal court the federal questions here involved. The federal courts are not obligated to enforce a constitutionally objectionable state tax. These taxpayers have never had the federal question of discrimination passed upon except insofar as the trial court and the Circuit Court of Appeals applied Section 511 of the Housing Amendments of 1955, (69 Stat. 653, Title 42, United States Code annotated, 1594, Note, Appendix A, *infra*), to taxes for periods subsequent to its effective date. That statute specified that

" * * * No such taxes or assessments (not paid or encumbering such property or interest prior to June 15, 1956) on the interest of such lessee shall exceed the amount of taxes or assessments on other similar property of similar value * * * "

Where the trial court and the Circuit Court of Appeals applied that section, they both found the taxes to be invalid. Actually, that portion of section 511 was but declaratory of the principles of constitutional law already existing and the Circuit Court of Appeals was wrong in not applying it as well to the discriminatory taxes for periods prior to the effective date of section 511.

When the county came into a federal court and sought to have those taxes tainted with discrimin-

ation enforced by the authority of the federal court, the situation was comparable to that which arises whenever one comes into a court and seeks to invoke the court's authority to enforce anything illegal. In principle, it is similar to the numerous cases where efforts have been made to have the courts secure to a party the benefits of an illegal contract. In such cases the courts are unanimous in saying that it is the duty of the court even if the parties do not raise the question to refuse to lend its assistance in carrying out that which is illegal. Thus, in *Schur v. Johnson* (Calif. Appeals) 38 P. (2d) 844 which was an action against a state to recover sales tax on the ground that the transaction was actually a gaming pay-off, rather than a sale the California Appeals Court said:

"Even if the parties to the suit do not raise the question of the illegality of the transaction upon which the suit is founded, it is the duty of the court to do so on its own motion when the acts upon which the plaintiff relies appear to be in violation of the law."

The courts simply will not lend their assistance to carry out that which is illegal. Thus, this court in *Gibbs v. Consolidated Gas Co. of Baltimore*, 130 U. S. 396, 32 L. Ed. 979, said:

"The law cannot recognize as valid any undertaking to do what fundamental doctrine or legal rule directly forbids nor can it give effect to any agreement, the making whereof was an act violating law. So that in short all stipulations to overturn—or an evasion of—what the law has established; all promises interfering with the working of the machinery of the government in any of its departments or obstructing its officers in their official acts, or corrupting them; all detrimental to public order and public good in such manner and degree as

the decisions of the courts have defined, all made to promote what a statute has declared to be wrong are void—. The distinction between *malum in se* and *malum prohibitum* has long since been exploded and as 'there can be no civil right where there can be no legal remedy and there can be no legal remedy for that which is itself illegal', *Bank of U. S. v. Owens*, 27 U. S. 2, it is clear that contracts in direct violation of statutes expressly forbidding their execution cannot be enforced * * * "

The logic of the foregoing while there applied to an illegal contract is just as applicable to an illegal tax. In *McMullen v. Hoffman*, 174, U. S. 639, 43 L. Ed. 1117, this court held that a federal court should not assist one who had made a contract that was against federal policy. The court said:

"We must therefore come back to the proposition that to permit a recovery in this case is in substance to enforce an illegal contract and one which is illegal because it is against public policy to permit it to stand. The court refuses to enforce such a contract."

The duty of the court in this case when the illegality of the very claim which is sought to be enforced becomes apparent was well stated by the Supreme Court of Kansas in *Patterson v. Imperial Window Glass Co.*, 137 Pac. 935:

"When in any stage of the proceedings it was established to the satisfaction of the court that the cause of action upon which the plaintiffs sought to recover arose out of a transaction in violation of the antitrust laws it became at once the duty of the court to refuse to aid either party to profit by the iniquitous agreement."

The court went on to say:

"In *Coppell v. Hall*, 74 U. S. 542, 558, 19 L. Ed. 244, it was said: 'Whenever the illegality

appears whether the evidence comes from one side or the other, the disclosure is fatal to the case..No consent of the defendant can neutralize its effect - - .The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation'."

Thus, in this case a federal court is called upon to enforce a tax which violated fundamental constitutional principles. As soon as that fact came to the attention of the court, it should have declined to lend its assistance to its enforcement.

The error in failing to take into consideration the constitutional principle is a rather fundamental one and the rule is well established that matters which are fundamental may be considered by an appellate court in the interest of justice at any time, *Kansas City Southern Railroad Co. v. Guaranty Trust Co.*, 240 U. S. 166, 60 L. Ed. 579; The lower court in this case committed legal error in disregarding the principle that a state tax may not be enforced if it discriminates against a federal lease and it is open to this court to consider that legal error. *Weems v. U. S.*, 217 U. S. 349, 54 L. Ed. 793; *Kryger v. Wilson* 242 U.S. 171, 61 L. Ed. 299; *Clyatt v. U. S.*, 197 U. S. 207, 49 L. Ed. 727; *Wilborg v. U. S.*, 163 U. S. 692, 41 L. Ed. 289.

This question affects the public interest of the United States and the federal court should not be a party to a discrimination against the United States in the tax field.

CONCLUSION

The taxes sought to be collected through the agency of the federal court in this case were inherently illegal because of the discrimination. That

question of the discrimination against the lessees from the federal government has never been passed upon by any court previous to the present litigation. The disposition of this case by this court should be similar to the disposition which this court made in the comparable case of *Phillips Chemical Co. vs. Dumas Independent School District*, 361 U. S. 376, 4 L. Ed. (2d) 384, where the courts simply concluded:

"Therefore this tax may not be exacted." The federal courts should deny their assistance in the collection of the discriminatory taxes whether they accrued before or subsequent to the effective date of Section 511 of the Housing Amendments of 1956 (42 U.S.C.A. 1954 Note).

Respectfully submitted,

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Attorneys for Petitioners

APPENDIX A

Section 511 of The Housing Act of 1956, 69 Stat.
653; Title 42, U. S. C. A. 1594 note

"Notwithstanding the provisions of Section 401 of this Act (this section), the provisions of title VIII of the National Housing Act (Section 1748-1748h of Title 12, Banks and Banking) in effect prior to the enactment of the Housing Amendments of 1955 (August 11, 1955) shall continue in full force and effect with respect to all mortgages insured pursuant to a certification by the Secretary of Defense or his designee made on or before June 30, 1955, and a commitment to insure issued on or before June 30, 1956 or pursuant to a certification by the Atomic Energy Commission or its designee made on or before June 30, 1956, except that the maximum dollar amount for each such mortgage shall be \$12,500,000. Nothing contained in the provisions of title VIII of the National Housing Act in effect prior to August 11, 1955 (Sections 1748-1748h of Title 12), or any related provision of law, shall be construed to exempt from State or local taxes or assessments the interest of a lessee from the Federal Government in or with respect to any property covered by a mortgage insured under such provisions of title VIII; Provided, That, no such taxes or assessments (not paid or encumbering such property or interest prior to June 15, 1956) on the interest of such lessee shall exceed the amount of taxes or assessments on other similar property of similar value, less such amount as the Secretary of Defense or his designee determines to be equal to (1) any payments made by the Federal Government to the local taxing or other public

agencies involved with respect to such property, plus (2) such amount as may be appropriate for any expenditures made by the Federal Government or the lessee for the provision or maintenance of streets, sidewalks, curbs, gutters, sewers, lighting, snow removal or any other services or facilities which are customarily provided by the State, county, city or other local taxing authority with respect to such other similar property; And provided further, That the provisions of this section shall not apply to properties leased pursuant to the provisions of Section 805 of the National Housing Act as amended on or before August 11, 1955 (Section 1748d of Title 12), which properties shall be exempt from State or local taxes or assessments."

APPENDIX B

Section 84.40.030, Revised Code of Washington

"84.40.030 Basis of valuation—Criterion of value—Growing crops excluded—Mines, quarries—Leaseholds. All property shall be assessed at fifty per cent of its true and fair value in money. In determining the true and fair value of property, the assessor shall not adopt a lower or different standard of value because it is to serve as a basis of taxation; nor shall he adopt as a criterion of value the price for which the property would sell at auction, or at a forced sale, or in the aggregate with all the property in the taxing district; but he shall value each article or description of property by itself, and at such price as he believes it to be fairly worth in money at the time the assessment is made.

"The true cash value of property shall be that value at which it would be taken in payment of a just debt from a solvent debtor.

"In assessing any tract or lot of real property, the value of the land, exclusive of improvements, shall be determined; also, the value of all improvements and structures hereon, and the aggregate value of the property, including all structures and other improvements, excluding the value of crops growing on cultivated lands and the growing stock of nurserymen.

"In valuing any real property on which there is a coal or other mine, or stone or other quarry, the land shall be valued at such price as the land would sell for at a fair, voluntary sale for cash; any improvements thereon shall be separately valued and assessed as above provided; and any personal property connected therewith shall be listed, valued, and

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assessed separately as other personal property is assessed under general law.

"Taxable leasehold estates shall be valued at such price as they would bring at a fair, voluntary sale for cash." (Emphasis supplied)

APPENDIX C

Section 84.40.080, Revised Code of Washington

"84.40.080 *Listing omitted property or improvements.* The assessor, upon his own motion, or upon the application of any taxpayer, shall enter in the detail and assessment list of the current year any property shown to have been omitted from the assessment list of any preceding year, at the valuation of that year, or if not then valued, at such valuation as the assessor shall determine from the preceding year, and such valuation shall be stated in a separate line from the valuation of the current year. Where improvements have not been valued and assessed as a part of the real estate upon which the same may be located, as evidenced by the assessment rolls, they may be separately valued and assessed as omitted property under this section: *Provided*, That no such assessment shall be made for any period more than three years preceding the year in which such improvements are valued and assessed: *Provided, further*, That no such assessment shall be made in any case where a bona fide purchaser, encumbrancer, or contract buyer has acquired any interest in said property prior to the time such improvements are assessed. When such an omitted assessment is made, the taxes levied thereon may be paid within one year of the due date of the taxes for the year in which the assessment is made without penalty or interest."